

C. Morrow



Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: Hummer Associates

File: B-236702

Date: January 4, 1990

DIGEST

Proposal, which, although labeled acceptable, was rated significantly inferior to those included in the competitive range, was properly found outside of the competitive range, where, after reasonably evaluating the proposal, the contracting agency determined that the proposal had no reasonable chance of being selected for award because the relative quality of the proposal, as compared to the other offerors, would require significant revisions and specific agency direction in order for it to be made competitive for award.

DECISION

Hummer Associates protests the exclusion of its proposal from the competitive range under request for proposals (RFP) No. 263-89-P(85)-0079, issued by the National Institutes of Health (NIH), Department of Health and Human Services. Hummer contends that NIH's determination to exclude its proposal from the competitive range was arbitrary, capricious, and an abuse of discretion.

We deny the protest.

The RFP was issued on March 28, 1989, to obtain comprehensive occupational medical services on a cost-plus-fixed-fee basis for approximately 13,000 employees, visitors and guest workers at NIH. These services entailed providing medical care, pre-employment and in-service physical examinations, preventive and health promotion programs, occupational health surveillance programs, and employee counseling services. The successful contractor was required to independently operate its own facility on-site at NIH furnishing all the necessary personnel, management, and supervision.

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The RFP advised offerors that the technical portion of the proposal would be the most important consideration and that the proposal should be as complete and as specific as possible. The three major evaluation factors listed in the RFP were Personnel Qualifications, worth 40 points, Understanding of Work and Technical Approach, worth 40 points, and Corporate Experience and Resources, worth 20 points.

The closing date for receipt of initial proposals, as extended, was June 12.^{1/} On the closing date, NIH received three proposals in response to the RFP which were evaluated by a Technical Evaluation Panel (TEP) comprised of individuals with expertise in the areas of medical care, management/administrative procedure, quality assurance, surveillance programs, data management, and nursing care. On August 14, the TEP determined that the Hummer proposal, although technically acceptable, was not within the competitive range. Hummer filed this protest with our Office on August 24. No award has been made.^{2/}

Hummer contends that its initial proposal could not have been reasonably eliminated from the competitive range because the proposed key personnel and staff possessed outstanding professional qualifications, including board certifications, and specific experience in occupational medicine, and because it has operated similar health facilities at various federal installations for the past decade. Hummer argues that Federal Acquisition Regulation (FAR) § 15.609 (FAC 84-16) requires the agency to include its proposal in the competitive range because the TEP rated it technically acceptable. Hummer argues that NIH was predisposed to accept only offers from companies with experience in operating the NIH occupational medicine facility and that NIH unlawfully applied an undisclosed evaluation criterion that the facility be operated by such a company.

^{1/} In its protest, Hummer makes much of NIH's decision to extend this closing date as showing undue favoritism towards incumbents. However, the record shows that this extension was legitimately granted to enhance competition at the request of a firm which ultimately did not submit a proposal.

^{2/} Since no award has been made, we must limit our discussion because of the potential adverse impact upon the ongoing procurement. Additionally, Hummer has labeled its detailed critique of its evaluation as confidential and privileged. However, we have examined the entire record in camera in resolving the issues raised by the protester.

In a negotiated procurement, the competitive range consists of all proposals that have a reasonable chance of being selected for award, including deficient proposals that are reasonably susceptible of being made acceptable through discussions. Engineers Int'l, Inc., B-224177, Dec. 22, 1986, 86-2 CPD ¶ 699. However, the evaluation of proposals and the resulting determination of whether an offeror is in the competitive range are matters within the discretion of the contracting activity, since it is responsible for defining its needs and for deciding the best method for accommodating them. Rainbow Technology, Inc., B-232589, Jan. 24, 1989, 89-1 CPD ¶ 66. In reviewing a competitive range determination, we do not reevaluate technical proposals. Instead, we examine the agency's evaluation to ensure that it was reasonable and in accord with the evaluation criteria. Id. We will not disturb a competitive range determination absent a clear showing that it was unreasonable, arbitrary, or in violation of procurement laws or regulations. Institute for Int'l Research, B-232103.2, Mar. 15, 1989, 89-1 CPD ¶ 273.

The determination that Hummer's proposal was not within the competitive range was based upon an analysis of Hummer's initial score and its evaluated weaknesses relative to those of the other offerors. The Hummer proposal was rated significantly lower than the other offerors' proposals and contained weaknesses which the TEP determined would require significant revisions as well as specific direction by NIH in order to materially improve Hummer's proposal. Based upon our review of Hummer's proposal, the technical evaluation materials, including the competing proposals, and the submissions of the parties, we do not find that the evaluation of Hummer's proposal and NIH's determination to eliminate Hummer from the competitive range was unreasonable, arbitrary, or in violation of any law or regulation.

Although Hummer argues that the NIH unlawfully applied an undisclosed criterion that offerors must have previous experience in operating the NIH occupational medicine services facility, we find no evidence to support this contention. Hummer, in effect, is complaining of the advantage that these firms may enjoy in competing for this contract. However, a firm may gain an advantage over other firms by virtue of prior experience, and such an advantage, so long as it is not the result of preferential treatment or other unfair action by the government, need not be discounted or equalized. Liberty Assocs., Inc., B-232650, Jan. 11, 1989, 89-1 CPD ¶ 29. Here, we find no evidence of

preferential treatment.^{3/} Instead, the record reveals that NIH downgraded Hummer's proposal for not demonstrating sufficient technical quality within the context of the RFP's evaluation factors.

For example, under Personnel Qualifications, Hummer's proposed key personnel and staff possessed good academic credentials and a breadth and depth of experience in many areas. However, in accordance with the RFP, NIH downgraded Hummer's proposal under this factor because it did not demonstrate qualifications beyond the minimum requirements which enhanced the offeror's ability to perform the contract. Specifically, each of Hummer's proposed key personnel had certain weaknesses in specific areas of expertise which the RFP indicated were important.

The Understanding of Work and Technical Approach evaluation factor advised offerors that the proposal must demonstrate a thorough understanding of the required work, including a day-to day plan detailed and comprehensive enough to demonstrate that the necessary steps to accomplish the tasks are completely understood by the offeror. NIH found that Hummer's day-to-day plan did not recognize the key groups which it needed to interact with to be successful; there was insufficient evidence that workload statistics were properly utilized in preparing the operational plan; less full time equivalent employees were proposed than the RFP estimate; the proposal did not describe in detail the necessary lab work; computerized linkages were not supported with examples; and no details were provided for improving existing surveillance programs.

Under the Corporate Experience factor, proposals were rated for the previous experience and effectiveness in similar and related work, the ability of the offeror to provide technical and quality assurance support, and the offeror's ability to provide personnel for operating the facility initially and throughout the contract. Hummer's proposal was rated weak under this factor because the bulk of Hummer's corporate experience was in providing on-site occupational

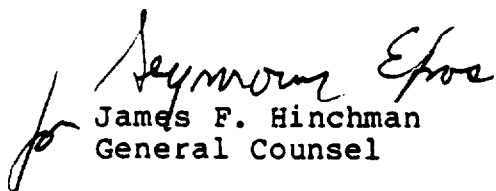
^{3/} In support of its allegation of preferential treatment, Hummer claims that it was contacted by a key incumbent employee who indicated he had an "inside track" to assure award to whatever firm proposed him as medical director. Hummer alleges that this shows the NIH's predisposition to select an incumbent firm. However, we ascertain no impropriety in the relatively common practice of an incumbent employee attempting to persuade potential offerors to hire him to enhance their proposals.

medical services in support of headquarters operations and not to support industrial or laboratory operations, the principal requirement under the RFP. Also, although Hummer had proposed to provide continuity by hiring the staff of the incumbent, it failed to provide any commitments from these individuals.

Hummer has responded in depth to the weaknesses the TEP found in the proposal. However, after considering the totality of its arguments against the weaknesses found in the proposal by the TEP, we find that Hummer has only stated a difference of opinion regarding the agency's professional judgment. Mere disagreement with a technical evaluation is not sufficient to establish an agency acted unreasonably, especially where, as here, the agency relied upon the judgment of technically qualified officials. See Institute for Int'l Research, B-232103.2, supra.

The agency reasonably found that Hummer's proposal, although labeled "acceptable," was significantly inferior to those included in the competitive range in all evaluation areas, that is corporate experience, understanding of work and technical approach, and personnel.^{4/} Since the agency reasonably found that only significant proposal revisions and specific NIH direction could materially improve Hummer's proposal, we do not find that it was improper for NIH to eliminate Hummer's proposal from the competitive range. See John W. Gracey, B-228540, Feb. 26, 1988, 88-1 CPD ¶ 199. In this regard, a competitive range determination properly may be based upon comparing the relative quality of proposals, even if the competition is diminished. See Institute for Int'l Research, B-232103.2, supra.

The protest is denied.


James F. Hinchman
General Counsel

^{4/} Indeed, one evaluator labeled Hummer's proposal to be only marginally acceptable.